NO. 84-1503

In The

Supreme Court of the United States

October Term, 1985

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO; ROBERT M. HEALEY; JACQUELINE B. VAUGHN; ROCHELLE D. HART; THOMAS H. REECE; and GLENDIS HAMBRICK, individually and as Officers of the Chicago Teachers Union,

Petitioners,

v.

ANNIE LEE HUDSON; K. CELESTE CAMPBELL; ESTHERLENE HOLMES; EDNA ROSE McCOY; DR. DEBRA ANN PETITAN; WALTER A. SHERRILL; and BEVERLY F. UNDERWOOD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF WILLIAM CUMERO IN SUPPORT OF RESPONDENTS, ANNIE LEE HUDSON, ET AL.

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INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of William Cumero pursuant to Supreme Court Rule 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the clerk of this Court.

William Cumero is a public school teacher in California who is currently litigating before the California Supreme Court, challenging the use of compelled agency shop fees for political and ideological purposes. His litigation is based upon this Court's decisions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, — U.S. —, 104 S. Ct. 1883 (1984), which involve substantive protections directly implicated by the Seventh Circuit's opinion. As such, Mr. Cumero has a strong interest in the outcome of this litigation. Due to his posture as a litigant in a related case, he also brings experience and a knowledge of the issues enabling him to address the importance of this case and its potential impact on agency fee decisional law.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 743 F.2d 1187 (1984).

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STATEMENT OF THE CASE

Amicus adopts respondents' statement of the case.

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SUMMARY OF ARGUMENT

This Court has recognized that compelled agency shop fees implicate the First Amendment freedoms of speech and association. The impact of the agency shop on these liberty interests, however, has been constitutionally justified by the governmental interest in labor peace and stability. But this strong governmental interest is meant only to prevent "free riders" from receiving the benefits of negotiation and administration of collective bargaining agreements without sharing in their costs. Compelled agency fees to support expenses unrelated to these teachers' association activities is an unconstitutional infringement on the First Amendment.

The opinion of the Court of Appeals recognizes all of these tenets and, far from creating a new liberty interest, merely relies on a due process rationale to protect an individual's First Amendment rights from a fee deduction for activities unrelated to collective bargaining. It provides procedural protection for the substantive rights already delineated by this Court.

Moreover, the Court of Appeals' opinion is a step toward greater clarity in the agency shop law developed by this Court. By formulating a due process analysis based upon bargaining agent expenses related to collective bargaining contrasted to unrelated expenses, the Seventh Circuit has avoided the definitional problems of the "political" and "ideological" inquiry. This provides more protection for First Amendment freedoms and concomitant adherence to the "free rider" rationale upon which the agency shop is based.

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ARGUMENT

I

THE COURT OF APPEALS CORRECTLY IDENTIFIED A DUE PROCESS LIBERTY INTEREST FOR THE PROTECTION OF ASSOCIATIONAL FREEDOMS

This Court has long recognized the fundamental liberties of speech and assembly reposed in the individual by the First Amendment. *De Jonge v. Oregon,* 299 U.S. 353, 364 (1937); *Palko v. Connecticut,* 302 U.S. 319, 324 (1937). Moreover, the close nexus between these two basic freedoms, derived from the important role an informed citizenry plays in our democratic system, led this Court to conclude that the ability to associate for the advancing of ideas and the airing of grievances was a fundamental liberty, inseparably tied to the First Amendment. *National Association for the Advancement of Colored People v. Alabama (NAACP),* 357 U.S. 449, 460 (1958); *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960). As such, this right of association is deserving of due process protection. As Justice Harlan stated in *NAACP:* "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment . . . ." 357 U.S. at 460.

The opinion of the court below is in complete harmony with these basic tenets. In recognizing the associational freedom implicated by compelled agency fees and in relying on a due process rationale to protect this interest, the decision does not create a new founded right; it steadfastly protects the liberty recognized by this Court to be at the core of democratic government.

A. Compelled Agency Shop Fees Implicate an Employee's Freedom to Associate for the Advancement of Ideas

The liberty interest in association is an expansive right and thus capable of taking many forms: it is directly involved in political associations (*Adler v. Board of Education,* 342 U.S. 485 (1952)), restrictions on entry into the bar (*Law Students Civil Rights Research Council, Inc. v. Wadmond,* 401 U.S. 154 (1971)), and campaign financing (*Buckley v. Valeo,* 424 U.S. 1 (1976)), to name a few of the many opinions addressing its numerous manifestations.

The Court in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), recognized that freedom of association is also implicated by the agency shop. The core of the constitutional problem concerns forcing an individual to support an employee association which may espouse positions contrary to the employee's ideals and beliefs. While protecting affiliations of like-minded persons who desire to pool talent and resources for expressive conduct is a beneficial aspect of this Court's First Amendment jurisprudence, compelled association is only destructive of the First Amendment liberties.

> "The fact that [employees] are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State." *Abood,* 431 U.S. at 234-35 (footnote omitted; citations omitted).

More recently, this Court in *Ellis* echoed the language in *Abood* by noting that "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights." *Id.* at 1896.

Yet associational freedoms are not absolute. Infringements can be justified by compelling state interests which are unrelated to the suppression of expressive conduct. *Roberts v. United States Jaycees,* — U.S. —, 104 S. Ct. 3244 (1984). Federal and state laws which allow agency shop formation are based upon the hope of maintaining labor peace by having all employees finance the exclusive representative in collective bargaining, thus preventing labor unrest spawned by "free riders" — nonmembers benefiting from representation without contributing to the bargaining agent's cost. This interest in labor peace has been held as compelling; hence the constitutional impingements recognized in *Abood* and *Ellis* were justified by this strong governmental interest. *Ellis,* 104 S. Ct. at 1896; *Abood,* 431 U.S. at 222.

The opinion below is completely consistent with these precedents. It merely moves one step beyond the substantive observations of *Abood* and *Ellis* and delineates well reasoned procedural protection.

B. The Court of Appeals' Decision, Far from Creating an Unprecedented New Liberty Interest, Merely Provides Procedural Protection for the Fundamental Right of Association

The substantive holdings of *Abood* and *Ellis,* which countenanced the associational impediments in order to effectuate compelling government interests, were based upon the "free rider" rationale. This rationale, however,

is not involved with bargaining agent expenses unrelated to contract negotiation and administration. Fees cannot be removed from dissenting employees' paychecks to finance such activities without violating the First Amendment.[1] *Abood,* 431 U.S. at 235-36 (employing "political or ideological" language); *Ellis,* 104 S. Ct. at 1892 (referring to expenses "necessarily or reasonably incurred" in bargaining duties). Consequently the freedom of association and speech will take precedence over the governmental interest in labor peace when the "free rider" rationale is not applicable.

This dichotomy—governmental interests in labor relations versus protected associational and speech rights—is the core of *Abood* and *Ellis.* And this is the distinction to which the opinion below is directed. As Judge Posner states:

> "True, freedom of association . . . is no more absolute than the other liberties [protected by] the due process clause . . . . But the fact that it enjoys the procedural protections capsulized in the term 'due process' means that the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably

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[1] *See International Association of Machinists v. Street,* 367 U.S. 740, 768 (1961). After acknowledging that Congress' purpose in allowing the agency fee was to deal with the free rider, the Court noted that the use of the fee

> "to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified."

assure that the deprivation will go no further than is necessary to prevent the individual from taking a free ride . . . ." 743 F.2d at 1193.

The court below recognizes that the agency shop fee was premised on the "free rider" rationale. The nonmember benefits from negotiation and administration of collective bargaining contracts—not from employee association activity not related to these functions. Hence, the appellate court holds, based on *Abood,* that if dues are collected for the latter activities, First Amendment freedoms are implicated, and they are no longer outweighed by a governmental interest because the "free rider" justification is inapplicable.[2] Thus, the opinion develops a line of reasoning based upon due process—the ultimate object to distinguish a constitutional infringement on associational rights to prevent labor unrest from an exaction of fees for activities not related to collective bargaining.

The opinion below is thus completely consistent with earlier case law; it recognizes the constitutionality of the agency shop and the justified impact on First Amendment rights. Its sole contribution to the agency fee decisional law is in the context of procedural due process, assuring that payments will in fact be used to finance a bargaining agent's collective bargaining activity and will go no further in depriving an employee of First Amendment liberties. As Justice Harlan stated in *NAACP,* 357 U.S. at 460, the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth

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[2] See Footnote No. 1, *supra.*

Amendment . . . ." The Seventh Circuit's opinion acts to provide this process.[3]

II

A DUE PROCESS LIBERTY INTEREST TRANSCENDS THE "POLITICAL" OR "IDEOLOGICAL" INQUIRY, THUS PROVIDING BETTER PROTECTION OF THE FIRST AMENDMENT AND CONTINUING ADHERENCE TO THE "FREE RIDER" RATIONALE

The dichotomy between compelled agency fees to support collective bargaining and political activities was initially delineated in *International Association of Machinists v. Street,* 367 U.S. 740, a case based upon statutory interpretation. This dichotomy was elevated to constitutional status in *Abood,* 431 U.S. 209. These cases distinguished proper fee expenditures for collective bargaining from political uses of the agency fees unrelated to the bargaining representative's responsibilities.

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[3] This Court's summary dismissals of *Jibson v. White Cloud Education Association,* — U.S. —, 105 S. Ct. 236 (1984), and *Kempner v. Dearborn, Local 2077,* — U.S. —, 105 S. Ct. 316 (1984), are not determinative here. A summary disposition, while interpreted as a vote by this Court on the merits *(Hicks v. Miranda,* 422 U.S. 332, 343-44 (1975); *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247 (1959)), has limited precedential value. It governs only on the precise issues and particular facts involved in the case which was summarily disposed. *Mandel v. Bradley,* 432 U.S. 173, 176 (1977); *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 180-81 (1979). *Jibson* and *Kempner* involved employees contending they could not constitutionally be required to pay the agency fee *prior* to an adjudication to determine its precise use and amount. The Court of Appeals' opinion below, however, never mandates a preseizure hearing. Indeed, it notes that under the current procedure an employee has 30 days *after* deduction to file an objection. Judge Posner does not criticize this temporal aspect of the process; he only condemns the employee association's control of the procedure and orders removal of any structural bias. *Jibson* and *Kempner* are thus factually distinct.

Yet the *Street* and *Abood* decisions, while thoroughly recognizing the liberty implications of compelled agency fees, did not attempt to draw a clear line between proper collective bargaining expenditures and taboo political activities. Indeed, *Abood* recognized that such line drawing presented "difficult problems" and would be even more difficult to define in the public sector. 431 U.S. at 236.

This dichotomy has continued to prove nebulous. One commentator noted that "[t]he difficulty with the test suggested by *Abood* and *Street* is that there is no clear distinction as a practical matter between collective bargaining and political activity. In many instances, union political activity is integrally related to the pursuit of union representational goals." D. B. Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds,* 14 U. Cal. D. L. Rev. 591, 601 (1981). Archibald Cox noted in his labor law text that this issue is "the elusive problem left unresolved by the Supreme Court of defining the kinds of 'political' expenses which cannot lawfully be taxed against an unconsenting employee." A. Cox, D. Bok, R. Gorman, *Labor Law* 1184 (1977).

In *Seay v. McDonnell Douglas Corporation,* 371 F. Supp. 754 (C.D. Cal. 1973), *rev'd on other grounds,* 533 F.2d 1126 (9th Cir. 1976), the court demonstrated this uncertainty by drawing the line to prohibit the use of union shop funds only for *partisan* political activities. 371 F. Supp. at 761 n.7. Expenses for other political purposes were held proper.

In the decision below, however, the court deviates from this political/collective bargaining intersection. In recognizing the due process protection of the associational liberty interest, Judge Posner notes:

> "[T]he procedure must make reasonably sure that . . . employees' wages will not be used to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological. . . . [T]he agency fee [must] not [be] used for any unrelated activities." 743 F.2d at 1194 (emphasis in original).

Thus, the Court of Appeals' decision transcends the political/ideological designations that have puzzled lower courts and commentators alike. This conclusion is a logical extension of *Ellis* and *Abood.* Both of these opinions recognized that compelled agency fees impinged on associational freedoms, but such impingement was constitutionally justified by the compelling state interest in labor peace. Yet the free rider rationale only applies to nonmembers receiving the benefits of contract negotiation and administration. *International Association of Machinists v. Street,* 367 U.S. at 767-68. The justification is not applicable to employee association expenses unrelated to collective bargaining—not just political or ideological expenses but all unrelated financing. Hence, compelling an individual to associate for any reason, other than to pay for the benefits of collective bargaining representation, violates the freedom to associate and does so without a compelling government interest. This is the line the opinion below attempts to draw. And by avoiding the political, ideological wording, it strengthens the First Amendment freedoms while remaining true to the free rider justification.

A. The Appellate Court Decision Better Effectuates an Employee's First Amendment Freedoms

In addressing the freedom to associate in *NAACP*, 357 U.S. at 460, Justice Harlan noted that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . ." Thus, the freedom to associate for a broad range of purposes is expressly recognized.

The opinion below, by transcending the political and ideological phraseology, is consistent with Justice Harlan's language. Associating only for political or ideological purposes is not the only protected freedom recognized in the *NAACP* case. One must not discount social, cultural, economic, or religious purposes; they are equally protected, but not encompassed within the *Abood* language. Consequently, the statement by Judge Posner seems more certain: "the procedure must make reasonably sure that . . . employees' wages will not be used to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological." 743 F.2d at 1194 (emphasis in original). Not only does this bypass the uncertainties and the hazy lines encompassed within political and ideological activity, but it also recognizes the liberty of association for many other purposes—not just political—unrelated to collective bargaining. It is wholly consistent and protective of Justice Harlan's declaration in *NAACP*.

The due process rationale adopted by Judge Posner is supported by *Ellis*. There this Court presented the following test to decide if expenses are related to collective bargaining and labor management relations:

> "[W]hen employees . . . object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." 104 S. Ct. at 1892.

Moreover, in discussing the expenses there at issue the Court did not concern itself with the potential political or ideological ramifications of the costs.

The test developed by *Ellis* supports the holding below that expenses must be germane to collective bargaining, and *Ellis* explains how a pertinent expense is to be identified. The next step is to cast aside any inquiry into political/ideological expenses, and center the analysis entirely on fees deducted to subsidize an employee association's collective bargaining responsibilities; the use of the compelled dues for any unrelated activities is prohibited and impinges on speech and associational freedoms.

B. The Reasoning of the Court of Appeals Promotes the Purpose of the Agency Shop by Preventing Nonmembers from Receiving Representation Without Payment of the Fees

Compelled agency shop fees are designed to ensure labor peace by weeding out the free riders—those who "refuse to contribute to the union while obtaining benefits of

union representation that necessarily accrue to all employees." *Abood,* 431 U.S. at 222. *Ellis* was most explicit in stating this Court's belief "that Congress' essential justification for authorizing the union shop was the desire to eliminate free riders." 104 S. Ct. at 1892.

The Court of Appeals' decision remains true to this justification. By distinguishing expenses related to collective bargaining from unrelated costs, the opinion not only protects First Amendment freedoms, but it also allows collection of the fee from employees who receive the benefit of union representation in contract negotiation and administration. Hence, an individual is not unfairly benefited by the employee association's representation free of charge.

Admittedly, perhaps an employee could receive a "free ride" from a bargaining agent's undertakings unrelated to negotiation and administration. But such a contention ignores this Court's language in *Street,* 367 U.S. at 768:

> "[The] use [of the agency fee] to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration . . . . In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified."

Moreover, such an argument is also inconsistent with the *Ellis* opinion. There, Justice White noted that "[o]nly a union that is certified as the exclusive bargaining agent is authorized to negotiate a contract . . . . Until such a contract is executed, no dues or fees may be collected" from nonmembers. 104 S. Ct. at 1892. The test subsequently developed by the Court was intended to aid in the

identification of union expenses related to its exclusive bargaining role. This quoted language and the accompanying test indicated that the free rider justification for the creation of the union shop only applies to nonmembers benefiting from contract related duties. There is no hitchhiking on activities unrelated to collective bargaining undertakings.

Thus, the free rider justification is addressed to the administrative and negotiating duties of the employee association. *Street, Abood,* and *Ellis* all concentrate on these responsibilities when discussing the reasons for adopting the agency shop. The test developed by the Seventh Circuit is fully consistent with this purpose.

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CONCLUSION

The liberties of speech and association reposed in the individual by the First Amendment have long been recognized by this Court not only as fundamental freedoms, but also as rights crucial to the functioning of a democracy. As such, these freedoms are entitled to a due process liberty protection before they are invaded by governmental action. The opinion of the Court of Appeals is consistent with these premises. It recognizes that the agency shop is a justifiable impingement on the freedom of association, but only insofar as the dues are used for activities related to collective bargaining. Any other fee exaction violates the freedoms this Court has so long protected. Consequently, by developing a due process rationale and by dispensing with the political and ideological labels, the opinion

below favors fundamental liberties, and merely provides procedural protection for substantive rights already recognized by this Court.

DATED: September, 1985.

Respectfully submitted,

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